

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY**

THE ESTATE OF CHARLES G.	:	
LAMB, by and through its	:	C.A. No: 07C-12-037 (RBY)
Executrix, BETTE W. LAMB and	:	
BETTE W. LAMB,	:	
	:	
	:	
Plaintiff,	:	
	:	
	:	
v.	:	
	:	
	:	
ZKT, L.L.C., a Delaware Limited	:	
Liability Company, and Symmetric,	:	
LLC, a Delaware Limited Liability	:	
Company	:	
	:	
	:	
	:	
Defendants.	:	

*Submitted: March 6, 2009
Decided: March 30, 2009*

**UPON CONSIDERATION OF
DEFENDANT’S SYMMETRIC, LLC
MOTION FOR SUMMARY JUDGMENT
*GRANTED***

OPINION AND ORDER

Jeffrey J. Clark, Esq., Schmittinger & Rodriguez, P.A., Dover, Delaware for Plaintiff

Michael K. Tighe, Esq, Tighe & Cottrell, Wilmington, Delaware for Defendant ZKT.

Nicholas E. Skiles, Esq., Swartz, Campbell, LLC, Wilmington, Delaware for Defendants Symmetric, LLC.

Young, J.

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Defendant Symmetric, LLC (“Defendant Symmetric”) has moved for Summary Judgment against Plaintiffs herein. Moving Defendant was contracted by co-Defendant ZKT to perform various projects associated with property owned and controlled by Defendant ZKT. Plaintiffs’ decedent fell in the parking lot area of Defendant ZKT’s property. Though moving Defendant did not own or lease any of the property associated with Plaintiffs’ decedent’s fall, Plaintiffs assert that moving Defendant should be maintained as a party Defendant, because of moving Defendant’s control over the parking lot while the work being performed by moving Defendant was in progress. Since moving Defendant describes the totality of its association with Defendant ZKT’s property as utterly not including the parking lot area; and since moving Defendant describes the complete absence of any contractual or actual involvement with the entire parking lot area; since co-Defendant ZKT does not dispute that at all; since Plaintiffs’ only effort against moving Defendant is a theory, unsupported by any evidence whatsoever, that moving Defendant must have had involvement of some sort regarding some aspect of the parking lot; this Motion is **GRANTED**.

I. FACTS

These facts are intended to cover the material necessary for the consideration of a variety of motions. As such, they will be referred to by reference in the remaining motions. On April 18, 2006, Plaintiffs’ decedent Charles Lamb was pursuing a course in physical therapy at Physical Therapy Services (“PTS”), located in the Duck Creek Plaza, Smyrna, Delaware. As a regular practice, Mrs. Lamb attempted to park in the same spot in front of PTS. Upon parking, Mrs. Lamb

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typically would get out of the car, then immediately walk around to the passenger side to help Mr. Lamb get out to walk to PTS. Mrs. Lamb regularly told Mr. Lamb to be careful, as she was concerned about his falling in the parking lot.

On this particular day, Mr. Lamb did not wait for Mrs. Lamb's assistance from the car. Instead, he attempted to get out, presumably to walk to PTS on his own. While he was attempting to get out of the car, he fell, face first, onto the parking lot pavement. Mr. Lamb struck his face on the pavement, which evidently knocked him unconscious. He died on May 26, 2006, allegedly because of the injuries sustained in the April 18th fall.

Various witnesses went to assist the Lambs immediately after the fall. These witnesses included Patricia Stachecki. Ms. Stachecki is a medical secretary for PTS. She did not see anything in the parking lot that could have caused Mr. Lamb's fall. Also responding was Philip Barkins, a physical therapist at PTS. Barkins did not see anything in the parking lot that could have caused the fall, either. Other witnesses also testified that they did not see anything wrong with the surface of the parking lot in the vicinity of Mr. Lamb's fall.

Plaintiffs' witnesses offer testimony that the parking lot surface was full of rubble, cracks, and other uneven surfaces. These witnesses claim that the general condition of the parking lot was in the same state of disrepair. Thus, the condition of the parking lot in the area of Mr. Lamb's fall is a matter for factual determination.

Mr. Lamb was 77 years old at the time. His medical condition was not good, though his mobility was said to have been improving as a direct result of the physical therapy he received from PTS. He had, however, fallen in December 2005, four

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months prior to the accident in this case. Mr. Lamb was hospitalized following that fall. While at the hospital, he was diagnosed with several severe conditions. These included pneumonia, acute renal failure secondary to rhabdomyolysis, chronic obstructive lung disease, congestive heart failure, and dementia secondary to Alzheimer's. After being dismissed from the hospital on December 15, 2005, Mr. Lamb was admitted to Westminster Village Health Center for rehabilitation. Mr. Lamb needed a walker to get around during this time at Westminster. His records from Westminster include confusion, wandering, noncompliance with safety measures, and a frequent need for redirection as areas of concern. After dismissal from Westminster, Mr. Lamb entered into physical therapy. A walker was recommended for his mobility.

Mr. Lamb occasionally used a cane to move around while he was attending physical therapy. His physical therapist, Philip Barkins, noted that during his visits, Mr. Lamb took short steps and tired easily. Barkins also noted that Mr. Lamb required considerable spoken cuing before he began his activities in therapy.

Defendant ZKT is the owner of the Duck Creek Plaza. Three times in 2005, in April, May, and July, Defendant ZKT was notified by the Town of Smyrna of International Property Maintenance Code violations. These violations concerned debris, trash, and potholes in the parking lot of the Plaza. Defendant ZKT later began renovating the property, including such work as building a new store and renovating the sidewalks. Defendant ZKT also requested that a paving company evaluate the parking lot and take appropriate measures concerning any necessary repairs. The invoice outlining the needs of the lot was produced one day after Mr. Lamb's fall.

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Defendant Symmetric entered into an oral agreement with Defendant ZKT to act as general contractor in the building and sidewalk renovations. Defendant Symmetric also agreed to replace the roof, electric system, and water line behind the plaza, which is the side of the buildings opposite the side of which Plaintiffs' decedent fell. Defendant Symmetric would hire subcontractors for these tasks individually. Defendant Symmetric was not hired to perform any tasks on other areas of the Plaza, including the parking lot and landscaping.

II. DISCUSSION

Defendant Symmetric argues that, while it was the general contractor in charge of refacing the Plaza, resurfacing the sidewalks, and reconfiguring the electric system, it was never responsible for resurfacing or maintaining the parking lot. Defendant Symmetric urges that since it was never responsible for the parking lot area in which Mr. Lamb fell, it owed no duty to him regarding anything that allegedly caused his fall.

According to the facts as Plaintiffs presents them to the Court, Defendant Symmetric was responsible for the "overall" renovation. This renovation, however, does not involve the parking lot in front of PTS. The digging of a water line that Defendant Symmetric performed occurred on the backside of the Plaza, not on the front where Mr. Lamb fell. Further, even though Plaintiffs attempt to place fault on Defendant Symmetric as the general contractor overseeing "all" the renovations, the additional fact that Defendant ZKT sought the services of S&M Paving concerning the lot itself defeats Plaintiffs' assertions. No evidence presented places Defendant

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Symmetric in control of the condition of the parking lot. Even though Plaintiffs attempt to draw the inference that because Defendant Symmetric's representative surveyed the condition of the lot after the fall, they fail to show that Defendant Symmetric owed any duty to Mr. Lamb concerning the overall condition of the parking lot, as a whole or in the general area of the fall.

In dispute and certainly material is the precise location of Mr. Lamb's fall. Throughout the proceedings, Plaintiff presented evidence that Mr. Lamb fell in the parking lot, allegedly by tripping over a pothole. Plaintiffs present photographs of potholes in the parking lot along with its other evidence in response to Defendant ZKT's motion. Much of this evidence is of little relevance, such as photographs of the landscaping around the Plaza, which undisputedly had nothing to do with the cause of Mr. Lamb's fall. In response to Defendant Symmetric's motion, however, Plaintiffs quote the deposition of Defendant Symmetric's representative, where the representative says Defendant Symmetric was in charge of overseeing "the whole project". In this context, though, "the whole project" clearly refers only to all of those tasks agreed to by Defendant Symmetric and Defendant ZKT. These tasks did not include anything regarding the parking lot. The tasks concern the sidewalk and facade of the Plaza, but not the parking lot.

Plaintiffs urge attention to the testimony of Defendant Symmetric's representative to support her contention that, as a general contractor, Defendant Symmetric was responsible for the whole of the Plaza. The evidence against this contention, however, is overwhelming. Defendant ZKT was negotiating with another company concerning resurfacing the parking lot. This is the same lot that

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Plaintiffs' response targets throughout its response to Defendant ZKT's motion. When Defendant Symmetric is being considered by Plaintiffs, though, Plaintiffs attempt to present deposition testimony perhaps suggesting that the fall occurred on the sidewalk. The clarification of that issue would be necessary for an accurate determination for the summary judgment motions. The arguments at hearing did clarify this. Defendant Symmetric did indeed have a duty to keep the area clear of obstructions as the general contractor in control of the sidewalks. The fall, however, occurred on the parking lot. Hence, the evidence does not allow an inference tying Defendant Symmetric to control of the area of the fall. Without such control, Defendant Symmetric had no duty to Mr. Lamb regarding the parking lot. Thus, Plaintiffs fail to support that essential element of a claim of negligence.

III. CONCLUSION

Therefore, Defendant Symmetric's motion is **GRANTED**.

SO ORDERED this 30th day of March, 2009.

/s/ Robert B. Young
J.

RBV/sal
oc: Prothonotary
cc: Opinion Distribution